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## FAX COVER SHEET

Number of pages
(Including cover page): See below

Date: April 13, 2005

To: Examiner R. Canfield, U.S Patent Trademark Office

Fax: (703) 872-9306

From: N. Paul Friederichs / jaf

Message: RE: Ser. No. 08/828,330; Inventor: William D. Morgan
I the undersigned, do hereby certify the following items are being transmitted by facsimile to the United States Patent Trademark Office on the above specified date.

1..Request for Examiner Interview (2 pg.)
2..Proposed Amendment (23 pg.)

N. Paul Friederichs

__X__ Original will **not** follow. _____ Original will follow.

CONFIDENTIAL



P.O. Box 48755
Coon Rapids, MN 55448-0755
http://www.angenehm.com/

Phone (763) 493-4011
Fax (763) 424-8473
Angenehm@angenehm.com

Applicant opposes all art rejections based upon Dearing. The opposition includes the arguments that he intends to present to the Board, complete with legal citations unless agreement is reached. The Examiner has subject to an interview insisted on maintaining the rejections.

Applicant has raised several options suitable for discussion to further distinguish the claims from Wilson et al. Examiner input is appreciated.

Due to the extended examination time, infringing devices are appearing on the market. Applicant appreciates the Examiner taking a close look at these issues such that they are ripe for appeal if necessary and agreement if reasonable.

It is applicant's belief that with a telephone call, any needed changes may be made by way of Examiner's Amendment, minimizing issues for appeal.

ANGENEHM LAW FIRM, Ltd.

By _____
N. Paul Friederichs, Reg. No. 36,515
P.O. Box 48755
Coon Rapids, MN 55448
Telephone: 763/560-0294
Facsimile: 763/560-0341

PF:jai

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

| | | | |
|---|---|---|---|
| Applicant | : | William D. Morgan | |
| Serial No. | : | 08/828,330 | |
| Filed | : | March 28, 1997 | Group Art Unit: 3635 |
| For | : | Insulated Removable Pond Cover | Examiner: R. Canfield |
| Docket No. | : | I 852-002-PAT | |

Commissioner of Patents and Trademarks
Washington, D. C. 20231

**PROPOSED AMENDMENT**

Dear Sir:

This is responsive to the outstanding Office Action issued September 13, 2004. Reconsideration and allowance of this application is respectfully requested in light of the following amendments and remarks.

In the Specification

Please amend the paragraph on page 1, beginning at line 2 as follows:

Man-made, usually rectangular settling ponds are used for holding sewage and industrial waste, commonly referred to as dirty water, e.g. non-potable water. These ponds are usually covered by a large one-piece geomembrane which has gas and water collection systems and is usually not insulated. These pond covers are laid on-site and secured by an anchoring trench. Because of their size, they are difficult to remove.

## IN THE CLAIMS

1. A pond cover comprising:

a plurality of panel units linked together;

means for insulating said pond cover, said insulating means comprising a generally rectangular layer of insulation wherein each of said panel units is filled internally with said layer of insulation and is sealed at either end and along either side by welding; and

means for linking said panel units together and securing said pond cover in position on a pond, said linking means comprising grommets disposed along said sealed end of each of said panel units, and each of said panel units is linked in vertical spaced relationship to an adjacent panel unit by at least one cable disposed through said vertical spaced grommets and formed into a loop projecting above said panel units, and said securing means including a second cable which is disposed through [the] an entire row of said loops and is anchored at either of its end to an anchoring means.

2. The pond cover of claim 1 wherein the loops disposed through the grommets project both above and below the panel units.

3. The pond cover of claim 1 wherein the loops disposed about the second cable are disposed through said grommets.

4. A pond cover comprising:

a plurality of panel units linked together;

means for insulating said pond cover, said insulating means comprising a generally rectangular layer of insulation wherein each of said panel units is filled internally with said layer of insulation and is sealed at either end and along either side by welding; and

means for linking said panel units together and securing said pond cover in position on a pond, said linking means comprising grommets disposed along said sealed end of each of said panel units, and each of said panel units is linked in vertical spaced relationship to an adjacent panel unit by at least one cable disposed through said vertical spaced grommets and formed into a loop projecting above said panel units, and said securing means including a second cable which is disposed through a row of said loops and is anchored at either of its end to an anchoring means.

5.(Five Times Amended) A cover and dirty water combination comprising:

dirty water;

a plurality of panels;

means for linking and de-linking the panels comprising

A PLURALITY OF

openings defined in the panels

AT EITHER END AND ALONG EITHER SIDE

or

VERTICAL SPACED RELATIONSHIP

and fasteners interconnecting the adjacent panels through adjacent openings in the panels; and.

means for securing the panels over the dirty water.

6. (Amended) The device of claim 5 wherein the panels are rectangular.

7. (Amended) The device of claim 5 wherein the panels are formed of a geomembrane.

8. (Amended) The device of claim 5 wherein the panels are approximately seven and one-half feet wide and approximately forty feet long.

9. (Amended) The device of claim 5 further comprising:

means for controlling temperature.

10. (Amended) The device of claim 9 wherein the means for controlling temperature comprises:

insulation material sealed inside the panels.

11. (Amended) The device of claim 10 wherein the insulating material is sealed inside the panels by a weld.

12. (Amended) The device of claim 9 wherein the means for controlling temperature comprises:

a rectangular layer of insulation.

13. Canceled

14. (Amended) The device of claim 5 wherein the means for linking further comprises:

grommets circumscribing the openings.

15. (Amended) The device of claim 5 wherein the openings are adjacent to edges of the panels.

16. (Amended) The device of claim 5 wherein the openings of adjacent panels are in a vertical spaced relationship.

17. Canceled

18. (Five times Amended) The device of claim 5 further comprising:

means for securing fasteners relative to the openings in the panels.

19. (Amended) The device of claim 5 further comprising:

means for anchoring the cover in a desired position.

20. (Amended) The device of claim 19 wherein the means for anchoring comprises:

at least one tie-down cable; and

means for anchoring the tie-down cable.

21. (Amended) The device of claim 19 wherein the anchoring means comprises an anchoring trench.

22. (Amended) The device of claim 20 wherein the tie-down cable interacts with the means for linking.

23. (Amended) The device of claim 5 wherein the means for linking joins the panels in a partially overlapping relationship.

24. (Canceled)

25. (Amended) The device of claim 5 wherein the cover is a waste treatment pond cover.

26. (Amended) The device of claim 5 wherein the means for linking and de-linking the panels, includes an elongated member which passes through an opening in at least one panel.

27. (Amended) The device of claim 5 wherein the cover overlies a tank.

28.(Four times Amended) A method of manipulating a pond cover comprising the steps of:

forming a plurality of panels defining openings;

disposing the panels over dirty water;

linking adjacent panels through adjacent openings with at least one fastener; and

de-linking the plurality of panels.

29. The method of claim 28 wherein the step of forming further comprises the step of:

forming rectangular panels.

30. The method of claim 29 wherein the step of forming further comprises the step of:

forming panels that are approximately seven and one-half feet wide and approximately forty feet long.

31. The method of claim 28 wherein the step of forming further comprises the step of:

forming a plurality of panels from a geomembrane.

32. The method of claim 28 wherein the step of forming further comprises the step of:

insulating the panels.

33. The method of claim 32 wherein the step of insulating further comprises the step of:

sealing insulation inside the panels.

34. The method of claim 33 wherein the step of sealing further comprises the step of:

welding the insulating material inside the panels.

35. The method of claim 32 wherein the step of insulating further comprises the step of:

insulating with a rectangular layer of insulation.

36. The method of claim 28 wherein the step of linking further comprises the steps of:

defining openings in the panels; and

interconnecting the openings.

37. The method of claim 28 wherein the step of forming further comprises the step of:

circumscribing the openings with grommets.

38.(Previously Amended) The method of claim 28 wherein the step of forming further comprises the step of:

defining the openings adjacent to edges of the panels.

39.(Previously Amended) The method of claim 28 wherein the step of linking further comprises the step of:

orienting the openings of adjacent panels in a vertical spaced relationship.

40.(Previously Amended) The method of claim 28 wherein the step of linking further comprises the step of:

inserting a cable through at least one loop forming at least one fastener.

41.(Twice Amended) The method of claim 40 wherein the step of linking further comprises the step of:

securing the loop relative to the openings in the panels.

42. The method of claim 28 further comprising the step of:

anchoring the cover.

43. The method of claim 42 wherein the step of anchoring further comprises the step of:

anchoring the cover with an anchoring trench.

44. The method of claim 42 wherein the step of anchoring further comprises the step of:

anchoring the cover with at least one tie-down cable.

45.(Previously Amended) The method of claim 40 further comprising the step of:

anchoring the cover with at least one tie-down cable, the tie-down cable passing through at least one fastener.

46. The method of claim 28 wherein the step of linking further comprises the step of:

orienting the panels in a partially overlapping relationship.

47. (Canceled)

48. The method of claim 28 wherein the step of linking further comprises the step of:

linking the panels together to cover a waste treatment pond.

49. A pond cover, comprising:

A) a plurality of panel units connected together in a vertical spaced relationship at their ends;

B) a plurality of grommets disposed at the connected ends;

C) a cable disposed through the grommets and formed into a loop projecting above the panel units; and

D) a cable disposed through the row of loops.

## REMARKS

This is responsive to the outstanding Office Action issued April 4, 2005. Claims 1-12, 14-16 and 18-49 were pending in the application. All claims were rejected. Applicant believes that application is in a condition for allowance. Applicant respectfully requests notice to that effect.

The Oath was rejected under 35 U.S.C. §251. Applicant and the Examiner agreed that the rejection would be maintained and that an oath would be submitted once the other issues were resolved. The proposed language for the oath is acceptable to applicant.

The specification was objected to as failing to provide proper antecedent basis for the terms "dirty water" and "aqueous solution." Claims 24 and 47 were canceled as the appeared redundant in that "dirty water" is "aqueous solution" and the claims appeared to fail to further limit the invention. No other claims include the language "aqueous solution". "Dirty water" has been appended into the summary of the invention. Accordingly, applicant believed the rejection should be withdrawn.

Claims 6-12, 14-16 and 18-27 were rejected under 35 U.S.C. §112 as the preamble of the claims did not correspond to the independent claim. An appropriate correction has been made.

Claims 5-7, 9-12, 14, 15, 18-20, 22, 24-29, 31-38, 40-42, 44, 47 and 48 were rejected under 35 U.S.C. §102 as being anticipated by Dearing. All the claims include a positive claim to the element "dirty water". The Office Action definition of dirty water for purposes of the 102 rejection is wrong.

The Office Action used a secondary source for the definition of "dirty water" in direct conflict with the primary sources. *Markman v. Westview Instruments , Inc.*, 52 F.3d 967, 979 (Fed. Cir. 1995) sets out the authorities that must be followed for determining the meaning of a term in the claim. Binding authority must be followed.

Specifically, [t]o ascertain the meaning of a claim, the governing authority considers three sources: **the claims, the specification, and the prosecution history.** *Id.* at 978 (citing *Unique Consepts, Inc. v. Brown*, 939 F.2d 1558, 1561 (Fed. Cir. 1991))(emphasis added).

The applicant and examiner agree that the claims, the specification and the prosecution history all define "dirty water" as "non-potable" water, e.g. non-drinkable water. In fact the summary of the invention from the first appeal states as much.

Dictionary definitions are secondary and are not to trump the meaning from the specification. A court **may**, in its discretion, receive extrinsic evidence in order to **aid** it in coming to a correct conclusion as to the true meaning of the language employed in the patent. *Markman*, 52 F.3d at 980 (citing *Seymour v. Osborn*, 78 U.S. 516, 546 (1871))(emphasis added). Extrinsic evidence upon which a court **may** rely in construing patent claims consists of all evidence external to the patent and prosecution history, including **expert** and inventor testimony, **dictionaries**, and learned treatises. *Markman*, 52 F.3d at 980. Extrinsic evidence can be used to understand, but not to cause conflict with intrinsic evidence. *Id.*

The Examiner had an affidavit from one skilled in the art, Affidavit of Claude Degarie, setting forth the definition of "dirty water" ¶ 7. This secondary evidence, while

in concert with the claims, specification and file history, was ignored as to the definition. The Office Action used a secondary definition obtained from a dictionary that is in direct conflict with the claims, specification and file history. Such definition is the basis of the Section 102 argument, which is in direct conflict with the law. *Markman,* 52 F.3d at 980 (citing *Seymour v. Osborn*, 78 U.S. 516, 546 (1871)).

Applicant's definition which is in concert with the law is the correct definition. "Dirty water" means "non-potable water."

Dearing fails to disclose dirty water. Accordingly, the rejection under 35 U.S.C. §102 should be withdrawn. Applicant respectfully requests notice to that effect.

Claims 5-7, 9-12, 14, 15, 18-20, 22, 24-29, 31-38, 40-42, 44, 47 and 48 were rejected under 35 U.S.C. §103(a) as being anticipated by Dearing. Applicant traverses on two separate legal basis. The are organized according to binding authority of the law. First, such a rejection violates the Fifth Amendment of the United States Constitution. Second, the rejection fails to meet the prima facie standard of an obviousness rejection under the MPEP.

**Fifth Amendment**

Equal protection is found in the 14th Amendment, which applies to the states. However, the Court in *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) determined that "due process" of the 5th Amendment embodies of "equal protection" of the laws, binding Federal authorities to the same concepts.

The Court in *Gulf, Colorado & Santa Fe Railroad Co. v. Ellis*, 165 U.S. 150 (1897) introduced the concept of reasonable classification. The law of "equal protection" as we know it today was perhaps best summarized in the law review article by Tussman and ten-Broek, *The Equal Protection of the Laws*, 37 Calf.L.Rev 341 (1949).

> The essence of that doctrine can be stated with deceptive simplicity. The Constitution does not require that things different in fact be treated in the law as though they were the same. But it does require, in its concern for equality, that those who are similarly situated be similarly treated. The measure of the reasonableness of a classification is the degree of its success in treating similarly those similarly situated....

The place one looks to determine whether the parties are similarly situated is to the law, which may either be elimination of a public mischief, i.e. discrimination, or the achievement of some positive public good, i.e. issuance of patents to encourage development of technology. *Id.*

Equal protection precludes disparity in treatment by a government or agency between classes of individuals whose situations are arguably indistinguishable. *Ross v. Moffitt*, 417 U.S. 600 (1974). People in the same class with factually and legally identical situations are to receive the same result.

Applicant discovered that the USPTO previously determined that inventions from the "clean" water industry are not prior art in the "dirty" water industry. United States Patent 4,672,691 involved a cover for "dirty water" ponds. The Examiner used a "clean water" cover as prior art to show obviousness of a "dirty water" cover. The applicant submitted evidence, which has been provided to the present Examiner and argued that

technology from the "clean water" industry would not be considered by one of ordinary skill in the art of "dirty water" and if they knew of it they would disregard it as being non-functional. Based upon the evidence and argument "clean water" art was determined to be non-analogous art to "dirty water." United States patent 4,672,691 issued based upon this determination.

Specifically, the Examiner in the 4,672,671 patent stated in the reasons for allowance:

> The declaration[1] filed under 37 CFR 1.132 filed on April 21, 2000 is sufficient to overcome the rejection of claims 1, 3-5, 7, 9-11 and 13-17 based upon obviousness.
>
> Applicant's declaration states that it would not have been obvious for one skilled in the art at the time the invention was made to consider [using clean water technology in dirty water applications].

The affidavit from the 4,672,691 case was provided to the Examiner and the file history and arguments were identified to the Examiner.

In the present case, the present applicant filed in the same time frame. The situations are factually identical in all relevant respects. The rejection under 35 U.S.C. §103(a) is an attempt to use a clean water reference to show obviousness of a dirty water application. The present Applicant submitted exactly the same evidence that was used in the 4,672,691 case to show that one of ordinary skill in the art would not consider using clean water technology in dirty water applications. The 5th Amendment

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[1] The declaration cited here is the same declaration cited throughout this Amendment, e.g., the declaration of Claude G. Degaries.

commands the results to be identical, since the facts, law and evidence is, in all relevant respects, identical[2].

The rejection illegally determines the results should not be identical. The rejection is wrong[3]. That is, the USPTO lacks the authority to single-handedly repeal the 5th Amendment to the United States Constitution. The result should be identical to United States Patent 4,672,691. "Potable water" art is non-analogous to "dirty water" art.

The rejection under 35 U.S.C. §103(a) should be withdrawn.

**MPEP**

The MPEP sets forth the "Basic Requirements of a *Prima Facie* Case of Obviousness" at MPEP §2143:

> To establish a *prima facie* case of obviousness, three basic criteria must be met. First, there must be some suggestion or motivation, either in the reference themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or combine the reference teachings. Second there must be a reasonable expectation of success. Finally, the prior art reference (or references

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[2] The Examiner's rejection of the affidavit is yet another violation of the Fifth Amendment. In the prior case, the very same affidavit was considered to be decisive on the point even though it lacks the same information that it lacks in the present situation. Such lack of information cannot make it determinative in one case and irrelevant in a factually identical case.

[3] Applicant questions whether the present Examiner had a good reason for not consulting with Examiner C. Upton (Examiner of U.S. Patent 4,672,691) on this issue, since the principal issue of this appeal was considered on re-issue of 4,672,691 on April 21, 2000.

> when combined) must teach or suggest all of the claims limitations.

MPEP §2143, 2100-111 (July 1998).

At least two of the three and arguably all three basic criteria are lacking in the present rejection. These criteria will be taken in the order presented in the MPEP.

First, the Office Action asserts that the language in the swimming pool cover reference, "or other liquids" would suggest or motivate someone of ordinary skill to combine the cover with dirty water, e.g. sewage treatment ponds. Applicant asserts that one of ordinary skill will understand the language "or other liquids" to be chemicals that are humanly safe for swimming pools, like chlorine, e.g. compounds that maintain the clean water status of the contents of the swimming pool. One of ordinary skill would not understand it to mean dumping liquified shit into a swimming pool.

Notably, applicant came forward with the affidavit of Claud G. Degarie, which provides a very extensive expert analysis of both fields. At paragraph 16 he states that people working in "dirty water" systems would not look to patents or publications concerning "clean water systems" for a solution to their problems. "The two fields are mutually exclusive." The Office Action lacks any evidence that one skilled in the art would consider adding liquified shit to swimming pools as one of the "other liquids" or use swimming pool equipment in ponds filled with liquified shit[4].

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[4] The entire argument has as its lynch pin the assertion of the Examiner that one skilled in the art would make such a connection. This is the act of Official Notice, since the teaching is not specifically found in the reference. According to the MPEP, Applicant is entitled, upon request, to an affidavit from the Examiner testifying to the critical fact. Given the fact that Applicant has submitted a countervailing affidavit,

Applicant has used terse language for the express purpose of making quite clear another reason why the two markets are, to use Mr. Degarie's words, "mutually exclusive." Politically correct terminology is obscuring the real world realities and applicant saw it wise to temporarily set aside political correctness to get at the root of the issue. It is emotionally disgusting to commingle food grade items and settling pond material. Restaurants do not treat sewage ponds. Nobody goes to swimming pool stores to get equipment for settling ponds. Poisons are not stored in the family refrigerator. Safety and health concerns on this magnitude make the Examiner's proposal absolutely repulsive and absurd. Mr. Degarie goes into many other functional reason why the markets remain mutually exclusive and clearly demonstrates how divided the clean water and dirty water markets are from each other. Anyone envisioning real world interaction, instead of black text on white paper, understands that there may be no more powerful division within the United States. Ideally, Applicant is sharing real world interactions and not merely a writting with black ink on white paper.

In summary, The Examiner's clean water reference does not suggest anything in the dirty water field. Applicant is the only one bringing forth evidence of how one of ordinary skill in the art would react to technology available in the clean water market and possibilities for its use in the dirty water market. *"It is further my opinion that people working on the development of 'dirty water' systems would not look to patents or*

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applicant is considering whether an affidavit of the Examiner is important to completion of the record.

*publications concerning 'clean water' systems for a solution to their problems."* Degarie ¶ 16. The rejection fails the first basic requirement of a prima facie case of obviousness.

Second, the combination the Examiner proposes did not have a reasonable expectation of success. Covers used for clean water systems, e.g. swimming pools, address two problems evaporation and purity of the water. Degaries ¶ 18. In contrast, covers for dirty water were concerned with collection of gases from anaerobic fermentation. *Id.* at ¶ 14 The gases must be collected quickly and without interruption. *Id.* at ¶ 14. One of ordinary skill in the art would not expect technology of clean water systems to work in dirty water systems, because they are working on solving different problems. *Id.* at ¶¶15 - 18. The concern in using a clean water technology in a dirty water system is interruption to the gas flow, which can result in the cover being torn loose from the moorings and destruction of the system. *Id.* at ¶¶ 14-15. See also Wilson et al. (4,438,836) Col. 3, lns. 8-20 and Col. 4, lns. 17-26. "People working in the 'dirty water' area do not look for solutions in the 'clean water' area." *Id.* at ¶17. That is, there is not a reasonable expectation of success.

The Examiner did not address why he asserts that there would be a reasonable expectation for success nor did he provide any evidence to refute the evidence Applicant submitted. The objection fails to meet the second basic requirement of a *prima facie* case of obviousness.

The prior art taken as a whole does not teach all of the limitations. The prior art fails to teach a cover over "dirty water". This appears to be agreed upon once the

definition of "dirty water" is properly resolved. The Examiner would not have been forced into using a definition that conflicts with the Federal Circuit and testimony of Degaries if in fact the references taught the elements. The objection fails to meet the third basic requirement of a *prima facie* case of obviousness.

The rejection under 35 U.S.C. §103(a) over Dearing must be withdrawn.

Claims 5-7, 9-12, 14, 15, 18-20, 22, 24-29, 31-38, 40-42, 44, 47 and 48 were rejected under 35 U.S.C. §102 as being anticipated by Wilson et al.

Options:

- location of gaps for gas exchange
- relation of panels to each other (non-stacked adjacent)
- shape of panels (flat instead of providing water reservoir)
- lack of gas collection conduit
- orientation of grommets to each other
- location and number of fasteners
- cable

Claims 5-7, 9-12, 14, 15, 18-20, 22, 24-29, 31-38, 40-42, 44, 47 and 48 were rejected under 35 U.S.C. §103(a) as being anticipated by Wilson et al.

## CONCLUSION

It is respectfully submitted that, with the present amendments to the claims, oath and drawings, and in light of the above remarks, all of the presently pending claims should be seen to be fully supported by the present specification and to define an invention patentable over all of the art of record, whether taken separately or in any combination. The prompt issuance of a formal Notice of Allowance is seen to be in order and is solicited to be forthcoming.

Should the Examiner be of the opinion that any minor matters remain to be settled prior to the issuance of a Notice of Allowance, a telephone call to the undersigned attorney of record is respectfully invited to assure prompt resolution thereof. Counsel may be reached at: **(763) 493-4011**

ANGENEHM LAW FIRM, Ltd.

By _____
N. Paul Friederichs, Reg. No. 36,515
P.O. Box 48755
Coon Rapids, MN 55448
Telephone: (763) 493-4011
Facsimile: (763) 424-8473

PF:jai

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE



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| Applicant | : | William D. Morgan | |
| Serial No. | : | 08/828,330 | |
| Filed | : | 03-28-97 | Group Art Unit: 3635 |
| For | : | INSULATED REMOVABLE POND COVER | Examiner: R. Canfield |
| Docket No. | : | I 852-002-PAT | |

Commissioner of Patents and Trademarks
Washington, D. C. 20231

**REQUEST FOR INTERVIEW**

Dear Sir:

Applicant requests an interview regarding the proposed Amendment. Specifically, the case is essentially ready for appeal. Applicant is concerned that the application does not get hung up on the new rejection based upon Wilson et al. for an additional period of time. Any agreements that can be reached at this time would facilitate the examination of this application that has no been pending as a re-issue for many, many years.

Applicant has proposed changes that he believes are agreed to with regard to all non-art rejections.